

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RICHARD JORDAN, JR.,**  
Claimant

VS.

**WALLBOARD SPECIALTIES, INC.**  
Respondent

AND

**LIBERTY MUTUAL FIRE INSURANCE CO.)**  
Insurance Carrier

Docket No. 1,028,092

**ORDER**

Claimant requests review of the May 18, 2006 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

**ISSUES**

The Administrative Law Judge (ALJ) found "[t]he preponderance of the evidence showed that the claimant was an independent contractor rather than an employee."<sup>1</sup> Thus, he denied claimant's request for benefits under the Kansas Workers Compensation Act.

The claimant requests review of the ALJ's determination, alleging the facts of this case favor a finding of an employer/employee relationship.<sup>2</sup> In support of this contention, the claimant references the Board's opinion in *Newberry*<sup>3</sup> and states that respondent should be estopped from denying the Act applies to claimant's claim.

Respondent argues the ALJ's preliminary hearing Order should be affirmed in all respects.

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<sup>1</sup> ALJ Order (May 18, 2006) at 1.

<sup>2</sup> Claimant's Brief at 2 (filed Jun. 20, 2006).

<sup>3</sup> *Newberry v. LaForge & Budd Construction Co.*, Docket No. 250,386, 2000 WL 623077 (Kan. WCAB Apr. 28, 2000).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The ALJ completely set forth the facts relevant to this claim and the Board adopts that statement as its own.

After hearing the evidence, the ALJ concluded that the "preponderance of the evidence showed that the claimant was an independent contractor rather than an employee."<sup>4</sup> He based this decision on the fact that claimant and his co-worker provided their own tools and transportation, were paid by the job, and were provided "little or no oversight" by respondent. Although the respondent did provide the materials and required claimant to complete a checklist at the end of a job, "[o]n balance though, the employment relationship more closely resembled a principal and independent contractor arrangement than one of employer and employee."<sup>5</sup>

While the underlying facts are not disputed, claimant maintains that when taken as a whole, this was not an independent contractor arrangement and was, in reality, an employment relationship.

The primary test utilized in Kansas to determine whether an employer/employee relationship exists is the employer's right of control and supervision of the work of the alleged employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control which is determinative.<sup>6</sup>

As found by the ALJ, the Board finds the evidence contained in the preliminary hearing record, at this juncture of the proceedings, supports the conclusion that claimant was not an employee but was an independent contractor of the respondent on the date of the accident. Claimant signed a document acknowledging he was an independent contractor. He agreed with respondent to perform drywall finishing and further agreed he would be paid by the foot and no taxes were deducted from his pay. Claimant provided his own tools and transportation, performing the work with very little oversight, other than when the project was taking too long. Claimant was not required to work any specific hours, but was required to get the job done in a timely fashion and perform a final inspection. Although claimant testified he was not able to work for others, he also testified that he had not been told he could not work elsewhere.

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<sup>4</sup> ALJ Order (May 18, 2006) at 1.

<sup>5</sup> *Id.*

<sup>6</sup> See *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994); *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991); and *Anderson v. Kingsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

Claimant places special emphasis on the fact that respondent compelled him to purchase workers compensation coverage and even provided an agent to claimant and "loaned" him the money for the purchase of the policy. Claimant contends the respondent's actions in requiring workers compensation insurance and withholding the purchase price of that policy justifies a finding that respondent should be estopped from denying coverage under the Act.

A similar argument was presented to the Board in the case of *Kidwell v. Advanced Home Design, Inc.*<sup>7</sup> In that case the Board held:

In some states, the purchase of insurance coverage is considered to control or override other factors. *Larson's Workers' Compensation Law*, Sec. 63.04. Such a rule helps bring certainty and assigns responsibility where there will be coverage. The respondent is then estopped from denying claimant was its employee. The parties' agreement is enforced in the workers compensation proceedings. The Board might agree with enforcing a clear promise to provide coverage as an employee.

But in this case, the claimant believes he was compelled to purchase workers compensation coverage through Travelers Insurance, not through Liberty Mutual Fire Insurance Co., respondent's carrier. And there is some issue as to whether the claimant "opted out" of the workers compensation coverage. The entire policy and any documents relative to the application and claimant's decision to "opt out" are not contained within the record. Thus, like the ALJ, the Board does not find claimant's counsel's estoppel argument applicable.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated May 18, 2006, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2006.

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BOARD MEMBER

c: Michael J. Joshi, Attorney for Claimant  
Caleb M. Kirwan, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>7</sup> *Kidwell v. Advanced Home Design, Inc.*, Docket No. 250,852, 2000 WL 759405, (Kan. WCAB May 31, 2000).